UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
HEATHER VINES COOK	)	CASE NO. 04-78475-MHM
	)	
Debtor	)	
	)	
WARNER, MAYOUE, BATES & NOLEN, P.C. f/k/a WARNER, MAYOUE, BATES, NOLEN & COLLAR, P.C.	)	
	)	**ADVERSARY PROCEEDING**
Plaintiff	)	**NO. 05-9023**
v.	)	
	)	
HEATHER VINES COOK	)	
	)	
Defendant	)	

ORDER GRANTING
DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This adversary proceeding is before the court on Defendant's motion for partial summary judgment. Plaintiff's complaint objects to Defendant's discharge under §727(a)(2) and (4) and seeks a determination that its claim is nondischargeable under §523(a)(5) or (15). Defendant's motion for partial summary judgment seeks a determination that Plaintiff lacks standing to pursue a determination of nondischargeability under §523(a)(5) or (15). For the reasons set forth below, Defendant's motion will be granted.

STATEMENT OF FACTS

The material facts are undisputed. Plaintiff is a law firm who represented Defendant in connection with her separation and anticipated divorce from her husband. Plaintiff represented Defendant through extensive litigation and settlement negotiation, but before a final decree of divorce was entered, both Defendant and her husband instructed their respective counsel to discontinue the divorce litigation. Defendant incurred fees to Plaintiff in an amount exceeding $95,000, which remain unpaid. The divorce proceeding has been dismissed and Defendant and her husband remain married.

DISCUSSION

Dischargeability under §523(a)(5)

Section 523(a)(5) of the Bankruptcy Code provides, in part, that a debt is nondischargeable if it is owed:

> to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record, or property settlement agreement, but not to the extent that–
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

The parties do not dispute that Plaintiff's claim is not a debt owed to a spouse, former spouse, or child of Defendant. Therefore, Plaintiff lacks standing to assert nondischargeability of its claim under §523(a)(5). *Woodruff, O'Hair & Posner, Inc. v. Smith*, 205 B.R. 612 (Bankr. E.D. Cal. 1997).

Dischargeability under §523(a)(15)

Section 523(a)(15) provides that a bankruptcy discharge does not discharge an individual debtor from any debt:

> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless–
>
> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
>
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

This exception to discharge was added by the Bankruptcy Reform Act of 1994. The issue presented by Defendant's motion for partial summary judgment is whether a creditor who is not a spouse, former spouse, or child of a debtor (a "non-spousal creditor") may bring a nondischargeability complaint under §523(a)(15); and, if that

answer is affirmative, whether the provisions in subsections (A) and (B) are independent exceptions.

In opposing Defendant's motion for summary judgment, Plaintiff relies upon *Zimmerman v. Soderlund*, 197 B.R. 742 (Bankr. D. Mass. 1996). The *Soderlund* court concluded that the plain language of §523(a)(15) rendered it applicable to any creditor, including a non-spousal creditor, whose debt was incurred in connection with a divorce proceeding, so that the law firm that represented the debtor in her contentious divorce proceeding could proceed under §523(a)(15) to have its claim determined nondischargeable. The *Soderlund* court placed significant reliance upon the fact that the legislative history was written before the conjunction between subsections (A) and (B) was changed from "and" to "or." The court also concluded that the two subsections were independent, so that if the debtor possessed the ability to repay the debt, the inquiry stopped and the debt would be determined to be nondischargeable without consideration of the exception described in subsection (B). Finally, the court concluded that the literal meaning of the statute was not "at variance with the statute as a whole, including its overall policy and purpose," so that the legislative history was not relevant to the interpretation.

The *Soderlund* court is the sole court that has reached the conclusion that non-spousal creditors may assert claims under §523(a)(15). Other courts that have addressed the issue have consistently rejected the holding in *Soderlund*. *See Savage, Herndon & Turner v. Sanders,* 236 B.R. 107 (Bankr. S.D. Ga.. 1999)(J. Davis); *Ashton v. Dollaga,* 260 B.R. 493 (9th Cir. BAP 2001); *Baroway & Dawson*, 271 B.R. 388 (Bankr. D. Col.

2002); *Estate of Donald Bryant v. Bryant*, 260 B.R. 839 (Bankr. W.D. Ky. 2001); *Woodruff, O'Hair & Posner, Inc. v. Smith*, 205 B.R. 612 (Bankr. E.D. Cal. 1997); *Brian M. Urban Co. L.P.A. v. Wenneman*, 210 B.R. 115 (Bankr. N.D. Ohio 1997); *Abate v. Beach*, 203 B.R. 676 (Bankr. N.D. Ill. 1997); *Woloshine, Tennenbaum & Natalie v. Harris*, 203 B.R. 558 (Bankr. D. Del. 1996). *See also Barstow v. Finaly*, 190 B.R. 312 (Bankr. S.D. Ohio 1995).

Congress added §523(a)(15) to the Bankruptcy Code in 1994 to close, or at least contract, the loophole that allowed debtors to discharge debts deemed to be property settlements rather than alimony, maintenance, or child support. The legislative history describes the intent of the statute, including a very clear discussion about to whom it is to apply, to-wit: *The statute was amended* :

> [To] add[ ] a new exception to discharge for some debts arising out of a divorce decree or separation agreement that are not in the nature of alimony, maintenance or support. In some instances, divorcing spouses have agreed to make payments of marital debts, holding the other spouse harmless from those debts, in exchange for a reduction in alimony based on a larger property settlement ... This subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts....
> *The exception applies only to debts incurred in a divorce or separation that are owed to a spouse or former spouse, and can be asserted only by the other party to the divorce or separation.* If the debtor agrees to pay marital debts that were owed to third parties, those third parties do not have standing to assert this exception, since the obligations to them were incurred prior to the divorce or separation agreement. It is only the obligation owed to the spouse or former spouse--an obligation to hold the spouse or former spouse harmless--which is within the scope of this section.

140 Cong.Rec. H10, 752, 10, 770 (daily ed. Oct. 4, 1994)(emphasis added).

In the case of *Woodruff, O'Hair & Posner, Inc. v. Smith*, 205 B.R. 612 (Bankr. E.D. Cal. 1997), the court concluded that reading §523(a)(15) as a whole, subsection (B) demonstrates that the statute is consistent with the legislative history. Courts interpreting §523(a)(15) have concluded that the word "unless" at the end of the primary section and immediately before subsections (A) and (B) operates to shift the burden of proof from the creditor to the debtor. *In re Huddleston,* 194 B.R. 681 (Bkrtcy.N.D.Ga. 1996); *Florio v. Florio,* 187 B.R. 654, 657 (Bankr.W.D.Mo. 1995); *Hill v. Hill,* 184 B.R. 750, 753054 (Bankr.N.D.Ill. 1995). Therefore, the *debtor* can avoid nondischargeability by showing an inability to pay the debt ***or*** by showing that the harm of nondischargeability to the debtor outweighs the harm of dischargeability to the spouse, former spouse or child. Only *Soderlund* has concluded that a creditor can avoid application of subsection (B) by merely showing that the debtor has an ability to pay. In *Smith,* 205 B.R. 612, the court concluded that subsection (B) logically operates to limit application of §523(a)(15) to a spouse, former spouse, or child because the benefit to debtor of discharge of a debt to a non-spousal creditor will always outweigh the benefit of nondischargeability to the spouse, former spouse, or child, who would receive no benefit from the nondischargeability of a debt for which they were not liable.

The court in *Wenneman* relied more heavily on the legislative history and the principles set forth in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026 (1989), in which the Court instructed that a statute should be enforced according to its plain meaning, without resort to legislative history, except in "those rare

cases in which literal application ... will produce a result demonstrably at odds with the intentions of its drafters," in which case, "the intention of the drafters, rather than the strict language, controls." *Id.* at 242, 109 S.Ct. at 1030-31. The *Wenneman* court concluded that the application of §523(a)(15) to a non-spousal creditor would be demonstrably at odds with Congressional intent.

In *Ashton v. Dollaga,* 260 B.R. 493, the court noted the public policy supporting both §§523(a)(5) and (15) is to provide protection to spouses and children. "It was not intended to cover any creditor holding any debt arising out of a family law proceeding." *Id.* at 495. A law firm holding a simple contract debt exhibits no circumstances that would entitled it to any special protection under §523(a)(15). The holding in *Soderlund* advanced by Plaintiff is unpersuasive.[1] Accordingly, it is hereby

ORDERED that Defendant's motion for partial summary judgment is granted: Plaintiff lacks standing to assert a claim of nondischargeability under §§523(a)(5) or (15).

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the _____ day of May, 2006.

_____
MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE

[1] It is perhaps noteworthy that included in the 2005 BAPCPA amendments to the Bankruptcy Code is an amendment to §523(a)(15) that adds the phrase "to a spouse, former spouse, or child of the debtor and" at the beginning of the section. Also, subsections (A) and (B) are deleted.